IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24/12/2003

CORAM

THE HON'BLE MR. JUSTICE P. SATHASIVAM
AND
THE HON'BLE MR. JUSTICE M. THANIKACHALAM

C.A.NO.928 of 1995

1. Anand
2. Arumugham
3. Shanmugham
4. Sankar
5. Purushothaman
6. Venkatesan ..Appellants.

-Vs-

State through Inspector of Police,
Nellikuppam Police Station
in Cr.No.403/94 ..Respondent.

Appeal filed under Section 374 Cr.P.C. against the judgment made in S.C.No.109/1995 dated 21.11.1995 on the file of Sessions Judge, Vallalar District, Cuddalore.

!For Appellants : Mr. V. Gopinath
Senior Counsel
for Mr.K.S. Rajagopalan

^For Respondent : Mr. V.M.R. Rajendran
Addl. Public Prosecutor

:J U D G M E N T

(Judgment of the Court was made by M.THANIKACHALAM, J.)

The accused in S.C.No.109/95, on the file of the Principal Sessions Judge, Cuddalore are the appellants.

2. Upon final report filed by the Inspector of Police, Nellikuppam Police Station, the accused were directed to face the trial, for the offences under Sections 147, 148, 324 & 302 r/w 149 I.P.C. It is the case of the prosecution, that all the accused formed themselves into an unlawful assembly on 22.4.1994 at about 9.00 p.m. at Sundaravandi Village, with the

common object of committing riot, that at that time, A1 and A2 were armed with deadly weapons, that in course of the prosecution of their common object, to commit the murder of one Duraisami Gramani, A2 stabbed him with an iron pipe over his chest, A3 to A5 inflicted various injuries over his body with sticks, that A1 caused hurt to Parimalarangan, while A6 caused hurt to Susila and that in view of their sharing of the common intention, to commit the offence, being a member of an unlawful assembly, in prosecution of the common object of that assembly, each one of the accused is liable to be punished, not only as per the individual act committed by them, but also for the collective act, committed by all, causing the death of Duraisami Gramani.

3. The learned Principal Sessions Judge while perusing the materials placed before her, had brought to surface prima facie case, to be proceeded further and in this view, various charges were framed against all the accused. Upon questioning, all the accused refused to plead guilty, denying the story of the prosecution also.

4. 15 prosecution witnesses have been examined to prove the charges levelled against all the accused and in order to manure the oral testimony, aid is sought from 21 documents and 7 material objects. The defence is not only total denial of the charges, but also an alternative case is projected, as if A1 and A2 are the victims, since they have been attacked by P.W.1 and others, and therefore, they are the aggressors. To disprove the weapon said to have been used by the second accused, to cause the injury to the deceased, Dr. Ezhumalai has been examined as D.W.1.

5. The learned Principal Sessions Judge, scanning the materials placed, weighing the same in the proper scale of assessment, had come to the conclusion, that the motives projected by the prosecution, are proved to her satisfaction, that A1 and A2 were armed with deadly weapons viz., M.Os.2 & 3 respectively, that A1 and A6 have caused simple injuries, using deadly weapons and therefore, they should be dealt with under Section 324 I.P.C., that A3 to A6 not only participated in the incident, being the members of the unlawful assembly, but also they have assaulted the deceased, with sticks, thereby causing multiple injuries, in addition to the stab injury caused by A2, by using weapon M.O.3 to Duraisami Gramani and that all the members, knowing fully well, that the offence is going to be committed in prosecution of the common object, participated in the event and in this view, Section 14 9 I.P.C. also would be attracted against some of the accused. Thus, concluding the learned trial Judge convicted A1 and A2 under Section 1 48 of I.P.C., sentenced them to undergo R.I. for one year each, convicted A3 to A6 under Section 147 I.P.C. and sentenced them, each, to undergo R.I. for six months, convicted A1 & A6 under Section 324 I.P. C. for causing injuries to P.W.7 and P.W.2 respectively, and sentenced them to undergo R.I for six months, each, and convicted A2 to A5 under Section 302 I.P.C. sentencing them to undergo life imprisonment, and convicted and sentenced A1 and A6, under Section 302 r/w 149 I.P. C. to undergo life imprisonment, ordering further, all the sentences to run concurrently, which are under challenge before us.

6. The prosecution case in brief:

(a) The accused/appellants, numbering six and P.Ws.1, 2, 7 & 8 are all the residents of Sundaravandi Village, which is within the territorial jurisdiction of Cuddalore Sessions Division. One Duraisami Gramani, who is murdered in the incident narrated in the final report, is the father of Deivasigamani (P.W.1), Parimalarangan (P.W.7) and Thiru Shivakumar (P.W.8). Tmt. Susila (P.W.2) is the wife of Duraisami and mother of P.Ws.1, 7 & 8. Accused 1 & 6 are brothers. Accused 2 & 5 are the sons of one Loganathan. Other accused are related to each other.

(b) Shivakumar (P.W.8) had illicit intimacy with one Sharada, wife of Kaliaperumal. The accused are related to Kaliaperumal and therefore, they have warned, P.W.8 to stop the illicit intimacy. On 21.4.1994 , when P.W.8 was alone in the house, Krishnamurthi, the first accused and one Vijayan assaulted P.W.8. Further, in the collection of contribution, for the celebration of Mariamman Temple, there was strained relationship between the parties. P.Ws.1, 2 & 7 after their return to the village, from Pudukuppam, were informed by P.W.8 that he was assaulted by the first accused and others.

(c) On 22.4.1994 at about 9.00 p.m., P.Ws.1, 7 and their father Duraisami standing nearby one Balakrishnan House raised their voice uttering "ahUk; ,y;yhj rkaj;jpy; ahUlh vd; mz;ziz moj;jJ@/ Hearing this noise, accused 1 & 2 armed with Aruval and pipe, along with other accused, came there. All the accused, questioning the conduct of P.W.8 with an intention to commit murder, assaulted Duraisami. The first accused attacked P.W.7, causing injury on his right hand and head. At the command of the second accused, A3 to A6 have pushed Duraisami, and on his fall, the second accused stabbed him with M.O.3, over his chest. Thereafter, A3 to A6 have also assaulted him, with sticks causing his death. Seeing that her husband is assaulted, when P.W.2 came there, the accused beat her, causing injuries. The incident was

witnessed by P.Ws.1, 2, 7 & 8, with the help of the electrical light, burning at the top of Balakrishnan's house. All the accused ran away with the weapons, from the scene of crime.

(d) P.W.1 immediately rushed to Nellikuppam Police Station, narrated the incident, which was reduced into writing. On the basis of the statement given by P.W.1, P.W.13 registered a case in Cr.No.403/94 under Sections 147, 148, 323 and 324 I.P.C., and submitted a printed FIR also, to the court concerned. It seems, the original complaint and the original printed FIR has been lost. Thereafter, at the direction of the Judicial Magistrate, with the help of the complaint available in the police station, Exs.P.1 and P.2 were prepared, in the presence of the accused.

(e) Thiru Paneerselvam (P.W.15), on receipt of the copy of the FIR, rushed to Sundaravandi Village, started his investigation on 23.4.199 4 at about 6.00 a.m. In the course of the investigation, inspecting the scene of crime, he prepared Ex.P.11, in the presence of P.W.9 and one Chandiragasan, in addition to drawing a sketch Ex.P.17. Photographs were also caused to be taken under M.Os.6 & 7. Between 6.30 and 9 .30 a.m., P.W.15 conducted inquest, over the body of the deceased, in the presence of Panchatdars and

witnesses, and the result is Ex.P.18 . He had also examined the eye witnesses, recorded their statements and made arrangement for autopsy, to ascertain the cause of death of Duraisami.

(f) In the incident, A1 and A2 also were injured and they have been admitted in the Government Hospital, Cuddalore, which was informed to the police station. P.W.13 went to the police station, at about 5.00 a.m. on 22.4.1993, recorded a statement from the first accused, and on that basis, he had registered a case in Cr.No.404/94 under Section 147, 148, 323 & 324 I.P.C. This case was also taken for investigation by P.W.15 along with Cr.No.403/94. P.W.4., Dr. Jayaraman examining A1 and A2, issued Exs.P.6 & P7 certificate. P.W.14 Dr. Elavarasan, had issued wound certificate for P.W.2 and P.W.7 i.e. Exs.15 & P.16 respectively.

(g) At the request of the investigating officer under Ex.P.9, P.W.6 conducted autopsy, on the body of Duraisami at about 3.00 p.m. on 23.4.1994. During the postmortem, he had noticed the following external as well as corresponding internal injur
External injuries:

1. Oval shaped incised wound - Right chest 4 cm below the right collar bone 4cm x 4cm depth of the above wound about 12cm long.

2. A lacerated wound 4 cm x 1cm x 1/2 cm right parietal region

3. An abrasion 3cm x 1 cm right knee.

Internal Injuries:

1. Fracture on 2nd right rib at costo sternal junction.
2. A tear about 5 cm in the right lung
3. A tear 3cm in length in the pericardium.

4. A tear 2cm in length over the right artrium.

From the nature of injuries and the effect caused by them, he opined, under Ex.P.10, that the deceased died of shock and hemorrhage.

(h) In continuation of the investigation, P.W.15 arrested A4 and A5 on 23.4.1994, at about 7.00 p.m. at Karamani Kuppam Bus Stop. On 24.4 .1994 at about 4.00 p.m., he arrested A1 and A2 in front of the Government Hospital. The second accused confessed under Ex.P.13, about the concealment of weapons, M.Os.2 & 3, in the presence of P.W.10 and another, which were recovered under Ex.P.14. The material objects, recovered during the investigation were sent for chemical examination, through Court and reports were obtained. The investigating officer who had recorded the statements of the accused, came to the conclusion, that no case is made out, on the complaint given by A1, whereas a case was made out, against the accused under the above said sections and in this view, he filed the final report, resulting trial, culminating into conviction, as aforementioned.

7. Heard the learned senior counsel, Mr. V. Gopinath appearing for the appellants and the learned Additional Public Prosecutor.

8. The learned Senior Counsel for the appellants, Mr. V. Gopinath submitted that the motives alleged are not at all proved to the satisfaction of the Court, in order to say that the offence would have been committed by the accused and in this view, the conviction is unsustainable. It is the further submission of the learned Senior Counsel that the prosecution has not even made an attempt to explain the injuries sustained by A1 and A2, in the same incident, which is fatal to the prosecution, creating doubt even about the genesis of the case and in this view, the accused are entitled to the reasonable benefit of doubt, since they could not be described as aggressors. In the evidence of prosecution witnesses, there are innumerable contradictions and omissions, not fitting with the probability and therefore, relying upon their oral testimony, is unsafe, is the further contention. It was pointed out, that there is no material to indict that all the accused formed themselves into an unlawful assembly members or acted in prosecution of the common object of that assembly and in that view, convicting some of the accused, those who have not actually caused injuries to the deceased, is against law and in this view, they are entitled to an acquittal. He has further pointed out, that the weapon said to have been used by the second accused, which is marked as M.O.3, would not have been deployed, for causing stab injury to the deceased, and in this view, a basic doubt had arisen spontaneously, regarding the weapon used and the part played by the second accused also and in this view, convicting the second accused as well as convicting accused 3 to 5, for the alleged assault said to have been committed by them, using stick, under Section 302 I.P.C. is not warranted. On these lines, a fervent plea was made for the acquittal of all the accused.

9. The learned Additional Public Prosecutor would contend that the non explanation of the injuries over the person of A1 and A2 is not fatal to the prosecution, since one of the witnesses also explained the same. It is the further contention of the Additional Public Prosecutor, that the postmortem doctor, who probed the injuries upon the body of Duraisami, had come to the conclusion that those injuries would have been caused by M.O.3 and there is no reason to discard the same, accepting the evidence of D.W.1 and in this view, he would contend that M.O.3 is the weapon used by A2, to cause the stab injuries to the deceased. In addition, he supported all the reasoning and findings of the trial Court, to retain the conviction.

10. Thiru Duraisami, the father of P.W1 sustained injuries, on 22.4.1994 at about 9.30 p.m. is not very much in dispute. The case of the accused appears to be, that due to enmity against Duraisamy in the village, somebody might have assaulted and murdered him, and taking advantage of the same, a false case is foisted against the accused. In fact, it is the case of the defence also that A1 and A2 have been assaulted and injured by P.W.1 and others and in order to escape from the punitive action, they have impleaded all the accused, taking advantage of the death of Duraisami, elsewhere.

11. At the request of the investigating officer, P.W.15, P.W.6 conducted autopsy over the body of Duraisamy and noticed an oval shape incised

wound, on the right chest, 4 cm below the right collar bone, to a depth of 12 cm. The other injuries are simple in nature, such as abrasion and laceration. The first injury caused damages to the right lung, as well as a tear in the Pericardium. All the internal injuries, noticed by the doctor correspond to the external injury No.1, and that injury alone was fatal in nature, leading to the instantaneous death of Duraisamy. The evidence given by P.W.6, regarding the cause for the death of Duraisamy is not challenged. The doctor has opined further that, it is possible, by using the weapon like M.O.3, to cause the external injury No.1 viz., an oval shape incised wound. This aspect of the case spoken by P.W.6, is challenged by the defence, even by examining another expert as D.W.1, which we will discuss infra. Though the doctor noticed four external injuries, according to P.W.5, all the injuries are not fatal or in other words, injuries 2, 3 & 4 were not the cause for the death of Duraisamy. Injuries 2 & 3 are lacerated wounds and injury No.4 is an abrasion, more or less negligible in nature. Though, the first injury was found on the right parietal region, as far as wounds 3 & 4 are concerned, they were on the forearm and right knee and therefore, certainly these injuries would not have caused any hemorrhage, leading to the death. In the same manner, though the second injury was noticed on the right parietal region, it has not caused any internal injury, showing serious in nature and in this view, injury No.2 also could not be the cause for the death and in fact, it is the evidence of the doctor also. Therefore, the persons who have caused injuries 2 to 4 could not be made liable directly, to answer Section 302 I.P.C. as did by the trial Court. If at all, they could be called upon to answer under Section 34 I.P.C. or at the worst, under Section 149 I.P.C., if case is made out. As seen from the charges framed, accused 2 to 5 were called upon to answer the charge only under Section 302 I.P.C. The trial Court unfortunately, without analysing the nature of evidence, and the nature of injuries said to have been caused by the other accused, found the accused 3 to 5 also guilty, which is not acceptable to us, since we find nil evidence against them, to rope in under Section 302 I.P.C. If at all as aforementioned, they could be made answerable only under Section 149 I. P.C. or for lesser offence, according to the overt act. It is the repeated case of the prosecution, that the second accused alone caused fatal injuries to Duraisamy by using M.O.3, that too, declaring that he should be finished off. Under the above circumstances, we conclude that Duraisamy died due to the injuries sustained by him, on his right chest on 22.4.1994 at 9.30 p.m. If this injury had been caused by the second accused, by using MO3 pipe, then his act should squarely come within the meaning of 302 I.P.C.

12. Thiru Sivakumar, P.W.8 appears to be the cause, for the strained relationship between the parties and the incident said to have taken place on 21.4.1994 at about 1.00 a.m. and subsequent events also. P.W.8 would state that on 21.4.1994, when he was sleeping in the house, in the absence of the family members, Krishnamurthy, Anandan (A1) and his brother Vijayan came to his house, took him to the street, beat him severely with stick. He further says thereafter, he went to the doctor for treatment. P.W.5, Dr. Raja has deposed that on 24.4.199 4, at 1.50 p.m., he examined Shivakumar, who informed to him that he was assaulted by four known persons with pipe, sticks and Aruval on 2 2.4.1994 at 1.00 a.m. as noted in Ex.P.8. He had noticed five injuries. As seen from the cross examination, the

information furnished by P.W.8, to P.W.5 is not challenged. It is the case of the defence also, to certain extent that P.W.8 misbehaved with the women folk of the village. Aggrieved by the conduct of P.W.8, it appears A1 and others had attacked him in the absence of his family members and the same was challenged by P.W.7 and his family members on their return. Therefore, the motive alleged by the prosecution for the incident, must be correct and that is why, in the incident, A1 and A2 also were injured, for which to certain extent, self defence is also pleaded. In this view, accepting the case of the prosecution regarding the motive, we have to find out, whether the motive was the cause for the death of Duraisamy, and for the injuries sustained by the prosecution witnesses.

13. The case of the prosecution, that all the accused should be dealt with, either under Section 147 or under Section 148 I.P.C., appears to be the later invention and to attract this offence, practically we find nil evidence, whereas, we find strong evidence that the accused would not have formed themselves, into an unlawful assembly. The definition to an unlawful assembly would indicate that the unlawful assembly must be to commit any mischief or criminal trespass or to show of criminal force, to compel any person to do what he is not legally bound to do, or to deprive any person regarding the possession and enjoyment of certain property or to enforce any right by means of unlawful method. When an assembly of 5 or more persons is designated an "unlawful assembly", with a common object of committing any rioting or any offence, then only each member of that unlawful assembly could be made liable individually, since they did the illegal act, in prosecution of the common object of that assembly. These necessary ingredients as enumerated under Sections 141 and 149 I.P.C. are not at all available in this case, which could be seen, even from the oral evidence of P.W.1.
14. It is not the case of the prosecution that all the accused formed themselves into an unlawful assembly and came to the place of the victims, to assault them, with such a common object. On the

other hand as spoken by PW1, he alone invited the accused, challenging their previous act. For better appreciation, we quote the same wordings as uttered by PW1 which reads "ahUk; ,y;yhj rkaj;jpy; ahUlh vd; mz;zd; rptFkhiu moj;jJ". In this process, probably accepting the challenge, some of the accused were compelled to meet PW1. It is the case of PW8 also that only after the challenge by PW7, all the accused came there, thereby showing that there would not have been any unlawful assembly with common intention. Therefore, in our view, it could not be said that all the accused have formed themselves into an unlawful assembly, in order to attack Duraisamy, that too, with the common object of murdering him. PW1 further says only after his challenge, all the accused came there and challenged him, questioning, why they were giving protection to a person, who i s outraging the modesty of the women in the village. Considering the previous incident, which took place, as projected by the prosecution and the subsequent challenge by PW1, we are of the firm opinion that the accused would not have gathered, with a common object of assaulting, either PW1 or Duraisamy, as the case may be. Therefore, all the accused, could not be convicted either under Section 147 or under Section 148 I.P.C. even assuming that some persons were armed with deadly weapons. The

accused could be convicted individually, according to their overt act and if any offence is made out, on the basis of the evidence. Under the above circumstances, we are persuaded to accept the contention of the learned senior counsel, that the accused are not liable to be convicted under Sections 147 and 148 I.P.C. and in this view, we conclude accused 1 & 2 are also not guilty under Section 148 and accused 3 to 6 are not guilty under Section 147 I.P.C. In this view, the conviction slapped by the trial Court for the above offences shall go.

15. The presence of A3 to A5 as spoken by all the witnesses, in our opinion, they do not form part of the unlawful assembly members. P. Ws.1, 2, 7 & 8 though have spoken as if A3 to A5 also had beat the deceased, they were unable to say which injury was caused by which accused using which weapon etc. Therefore, in the absence of specific overt act as against A3 to A5, we are unable to convict them even for the lesser offence, though they are relieved from the major offence under Section 302 I.P.C.

16. As evidenced by Exs.P.6 and P7, A1 and A2 have reported to P.W.4 , that they have been assaulted by four known persons on 22.4.1994 at about 8.30 p.m. at Sundaravandi. The accused are prosecuted, for the incident said to have taken place on 22.4.1994 at about 9.00 p.m. Though we find some difference, regarding the time factor, it is the submission of the learned senior counsel appearing for the accused, that the accused 1 & 2 also were injured, on the same day, more or less at the same incident. Because of this reason alone, a strenuous argument was made, before us that the non-explanation of the injuries, sustained by accused 1 & 2 is fatal to the prosecution, since it will disclose, the suppression of material facts, doubting about the genesis of the prosecution case itself. Hence, even ignoring the time factor, we have to take that accused 1 & 2 also sustained injuries, in the same incident, for which they are prosecuted.

17. The first accused sustained only a laceration of the dimension 5 x .5 x .5 cm on the left parietal region of scalp and this injury is admittedly simple in nature. The second accused Arumugham sustained two injuries; one on the right parietal region of scalp, measuring 5 x 1 x .75 cm and the second injury is a lacerated injury on the right fore head measuring 2 x 1 x .75 cm. These injuries are also simple in nature. Except the fact, the above injuries are found over the head, they are not serious in nature and we could say even they are superficial, not requiring any explanation. However, the learned counsel would submit, that the injuries are noticed on the vital part of the body and therefore, the prosecution is bound to explain the injury, and for the non explanation, an adverse inference should be drawn.

18. In Lakshmi Singh v. State of Bihar (1976 Crl.L.J. 1736), the Apex Court has ruled, as to what would be the effect of the nonexplanation of the injuries, sustained by the accused, at the time of occurrence or in the course of altercation. It is held by the apex Court that the following inference could be drawn for the non explanation of the injuries and they are

(1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable.

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

The non explanation takes greater importance, when the witnesses examined were interested or inimical, as observed by the Apex Court. Here also, most of the witnesses examined are either interested or having some grudge over the accused. Therefore, there is nothing wrong in expecting explanation, from the prosecution side for the injuries sustained by A1 & A2.

19. The learned senior counsel placing reliance upon a decision in Subramani v. State of Tamil Nadu (2002 SCC (Crl) 1659, would contend that even in the case of simple injury, where the injuries were noticed on the vital part of the body, the prosecution is bound to explain the injuries. The Apex Court in the above ruling, had ruled as follows:
"In the instant case, though the appellants had suffered injuries on vital parts of the body, even though simple, the prosecution failed to give any explanation for such injuries. We are not persuaded to accept the submission of learned counsel for the State that the injuries being simple, the prosecution was not obliged to give any explanation for the same. Having regard to the facts of the case the omission on the part of the prosecution to explain the injuries on the person of the accused may given rise to the inference that the prosecution is guilty of suppressing the genesis and the origin of the occurrence and had thus not presented the true version. It may well be that the prosecution witnesses were lying on a material point and, therefore, render themselves unreliable, or it may be that the defence version explaining the injuries on the person of the accused is probably the true version of the occurrence which certainly throws a serious doubt on the prosecution case."

20. The learned Additional Public Prosecutor would submit, that though the interested witnesses have spoken about the crime, committed by the accused, their evidence is clear, cogent and creditworthy and therefore, for the non explanation of the injuries on the accused, no adverse inference could be drawn, as if the genesis of the case was suppressed. It is the further contention of the learned Additional Public Prosecutor, that in fact the injuries are trivial in nature and as well as explained by the prosecution witnesses also, though there are some contradictions, it could be well accepted. The Apex Court has also ruled in Sucha Singh v. State of Punjab (2003 SCC (Cri) 1697 that

"Non explanation of injuries by the prosecution will not affect the prosecution case where injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it outweighs the effect of the omission on the part of the prosecution to explain the injuries."

It is also the dictum of the Supreme Court that it is for the defence to put questions to the prosecution witnesses regarding the injuries on the accused persons. When that is not done, there is no occasion for the prosecution witnesses to explain any injury on the person of an accused. Therefore, as per the settled proposition of law, if the witnesses examined on behalf of the prosecution are, believable by the Court in proof of guilt of the accused beyond reasonable doubt, question of obligation of the prosecution to explain injuries sustained by the accused will not arise (vide 2003 SCC Cri 1697 referred supra). Having the above principle in mind, we have to see whether the non explanation of the injuries upon A1 and A2 is fatal to the prosecution and if any explanation is offered, whether it is sufficient.

21. P.W.1 has not given any explanation about the injuries sustained by A1 & A2. It was suggested to him, that A1 and A2 were attacked by Sivakumar and Parimalarangan (P.W.7), on the same day, at about 8.0 0 or 8.30 p.m., causing injuries, which he denied. It is not the definite case of the accused, that at the same time, A1 and A2 also sustained injuries. In this view, the non explanation of the injuries found on A1 & A2 would not cause any abrasion to doubt about the genuineness of the prosecution. P.W.7 one of the injured witnesses, has spoken in detail, about the criminal act committed by the accused. When he was cross examined, it is not the case of the accused that as aggressor, P.W.7 and his party attacked the accused by way of self defence, they were constrained to assault the other party, in order to protect them. On the other hand, it is suggested to P.W.7, as if, in the prior incident, which took place at about 8.00 or 8.30 p.m., they have attacked A1 and A2, caused injuries. If that is so, as per the case of the accused, there is no duty cast upon the prosecution, to explain those injuries. In fact, very fairly, when the injuries sustained by A1 & A2 were brought to the notice of P.W.7, he would admit that he assaulted A1 & A2, since the second accused declared the death of his father. It is natural for P.W.7, when his father is assaulted by A1 & A2, to retaliate the same, and in that process alone, it seems P.W.7 assaulted A1 & A2, and the said injuries being superficial in nature, as indicated by us, the non explanation of the same, by the prosecution at the first instance, has not created any doubt, in our mind, in order to view the case doubtfully. Considering the superficial and simple injuries sustained by A1 and A2 and accepting the explanation offered by P.W.7, we are satisfied that the prosecution has explained the injuries, sustained by A1 and A2, when it was sought for, and therefore, as ruled by the Apex Court, we could not draw any adverse inference, as if the injuries sustained by A1 and A2 were suppressed wantonly. Thus, ignoring this defence, we have to see the individual overt act committed by the accused.

22. The first accused and 6th accused were found guilty under Section 324 I.P.C. P.W.7 sustained, as disclosed by Ex.P.16, an incised wound measuring 4 x .5 x bone deep, over the scalp and another incised wound with contusion over the back of left third finger measuring 1 x .5 x .5. The doctor P.W.14 has testified about the injuries and according to him, the injuries which are simple in nature, would have been caused by a weapon like M.O.2. P.W.7, who sustained the injuries, has categorically deposed about the actual involvement of the first accused, in assaulting him, and he has asserted that the first accused attacked him over his head, causing injuries.

Since this injury was caused by a deadly weapon, the first accused should be dealt with, under Section 324 I.P.C., in view of the further fact, his presence was admitted. We find no error either on fact or on law, in convicting the first accused under Section 324 I.P.C. for causing simple injuries to P.W.7 and this conviction should be confirmed.

23. Tmt. Susila, wife of the deceased says, that she was assaulted by the 6th accused, at the time of the incident. The doctor, who examined P.W.2, also noticed the contusion measuring 4 x 3 cm at the left back of the chest and this injury is simple in nature, as evidenced by Ex.P.15. P.W.1, 7 & 8 also have spoken about the act of the 6th accused, in assaulting P.W.2 and causing injuries. Considering the acceptable oral and medical evidence, the 6th accused was found guilty, under Section 324 I.P.C. by the trial Court and we find no irregularity and in this view, we are satisfied that the conviction slapped upon the 6th accused also has to be confirmed.

24. The submission made by the learned counsel for the appellants, that if at all, accused No.2 would have acted to protect himself, in the exercise of the right of private defence and therefore, the same could not be described as an offence, since it is exempted under Section 96 of the Indian Penal Code is not acceptable to us. Section 100 I.P.C. says,
"The right of private defence of body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:-

First:- Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

Secondly:- Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

Thirdly:- An assault with the intention of committing rape;

Fourthly:- An assault with the intention of gratifying unnatural lust;

Fifthly:- An assault with the intention of kidnapping or abducting;

Sixthly:- An assault with the intention of wrongfully confining a person under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

The act of the accused would not come within the above categories, as enumerated under Section 100 I.P.C. It is true, on the apprehension, that the life is in danger, one can exercise, the right of private defence and it is not an absolute one that the accused should have sustained injury. The apprehension must be a reasonable one, which is restricted under Section 99 I.P.C. In other words, the right of private defence is not available, when any act, which does not reasonably cause the apprehension of death or of grievous hurt, if done or attempted to be done, as explained under Section 99

of the Indian Penal Code. From the cross examination also, we are unable to find any such apprehension, in the mind of the accused, so as to cause fatal injuries, to the deceased, in order to protect themselves. When the second accused was examined, under Section 313 Cr.P.C., he has not even explained, under what circumstances, he was compelled to attack the deceased, so as to protect his body from the aggressor, apprehending danger to his life, or something like that. Therefore, in the absence of any evidence on the side of the accused, directly or eliciting from the prosecution witnesses at the time of the cross examination, it is impossible, to construe that the second accused had attacked the deceased, while exercising the right of private defence. Even assuming that kind of private defence was available to the accused, in our opinion, he had exceeded the limit, since it is said, by using an iron pipe, he caused serious injuries to the deceased, which terminated his life instantaneously, at the spot itself. In this view, the theory of right of private defence also, does not deserve any acceptance.

25. The main thrust of the learned senior counsel Mr. V. Gopinath is that M.O.3 weapon would not have been used by the second accused, to cause the injuries to the deceased, as narrated. In this context, we have to see the nature of weapon and the injury noticed by the postmortem doctor. It is the specific case of the eye witnesses, that the second accused, using the iron pipe, which is identified as M.O.3 stabbed Duraisamy over his chest declaring "xHpe;Jnghlh@/ In fact, P.W.1 says that the iron pipe is having a sharp edge and according to him, the thread portion is called sharp edge.

26. It is also the case of P.W.7 that the second accused stabbed his father with an iron pipe, identified as M.O.3, confirmed by P.W.8. We have seen M.O.3 and examined the nature of the weapon also. Admittedly, it does not have any sharp edge, as we understand generally, though the front portion is somewhat sharp, not as that of a knife. In the front portion of the pipe, there are threads. Therefore, if this kind of weapon is used for stabbing a person, certainly it will pierce into the body, causing damage to the internal organs and it all depends upon the handling of the weapon, the force used by the person, who deployed the same at the time of stabbing. Therefore, as a matter of rule, it is not possible to say, that this iron pipe could not have been used, for causing the stab injury, sustained by Duraisamy.

27. The learned Additional Public Prosecutor placing reliance upon a decision in Thaman Kumar vs. State of Union Territory of Chandigarh 2003 (7) SBR 175 would contend, that the conflict between the oral testimony and the medical evidence alone should not be the factor, to be taken into consideration in judging the reliability of ocular testimony, the fact being, the injury or wound inflicted, would depend upon the user of the weapon. In the above said decision, it is held:

"The conflict between oral testimony and medical evidence can be varied dimensions and shapes. There may be a case where there is total absence of injuries which are normally caused by a particular weapon. There is another category where though the injuries found on the victim are of the type which are possible by the weapon of assault, but the size and dimension of the injuries do not exactly tally with the size and dimension of the weapon. The third category can be where the injuries found on the victim are such which

are normally caused by the weapon of assault but they are not found on that portion of the body where they are deposed to have been caused by the eye-witnesses. The same kind of inference cannot be drawn in the three categories of apparent conflict in oral and medical evidence enumerated above. In the first category, it may legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful. However, in the second and third category no such inference can straightaway be drawn. The manner and method of assault, the position of the victim, the resistance offered by him, the opportunity available to the witnesses to see the occurrence like their distance, presence of light and many other similar facts will have to be taken into consideration in judging the reliability of ocular testimony."

According to the Additional Public Prosecutor, this case comes under the second category viz. that the injury found on Duraisamy is of the type, which is possible by the weapon of assault, but the size and dimension of the wound do not exactly tally with the size and dimension of the weapon. Therefore, if there is a possibility to inflict the stab injury, as noticed by the doctor, then to support the same, if there are ocular evidence, unassailable in nature, then irrespective of the absence of sharpness in M.O.3, we can say positively that the deceased was inflicted a stab injury, by usi ng M.O.3. In this context, we have to see expert opinion.

28. P.W.6 is the doctor, who conducted autopsy over the body of Duraisamy. The shape of the first injury is oval shaped incised wound on the right chest 4 cm below the right ocular bone, depth of the above wound about 12 cm. On exploration of the above said injury, the doctor noticed a tear about 5 cm on the right lung and another tear extending 3 cm in length in the pericardium, in addition to causing another tear 2 cm over the right atrium. He further opined that the above said external injury, is possible by stabbing by a weapon like M.O.3 iron pipe. He has further testified that he was examined by the police, by showing M.O.3 pipe also. But, during the cross examination, he would state that external injury No.1 and its corresponding internal injury is not possible by M.O.3. Having said so, at the time of reexamination, he asserts once again, since the external injury No.1 is oval shaped, it is possible by using M.O.3 pipe. He further says, if it is an incised wound, then it will n ot be possible by M.O.3. The deceased had an oval shape incised wound is not very much in dispute. Though it has oval shape at the beginning, since that injury went inside the body, probably, it is described as incised wound. Therefore, the oral evidence of P.W.6 is clear, that oval shape incised wound could be caused by M.O.3, like weapon and the possibility cannot be ruled out.

29. D.W.1, a civil surgeon on examining M.O.3 in the court, has given evidence and admittedly he has not seen the injury. It is the case of D.W.1, that both the ends of M.O.3 are blunt as well as irregular, but one end is serrated. He has further deposed that injury No.1 in Ex.P.10 postmortem certificate, could be caused by M.O.3. But according to him, since injury No.1 is an oval shape injury, it is not possible by M.O.3. For that, he has

not assigned any reason to discard the oral testimony of P.W.6, who has seen the actual injury, as well as the weapon. During the cross examination, he admits, since he is giving evidence before the Court, only on seeing Ex.P.10., his opinion is only probable and not definite. Therefore, as rightly urged by the learned Additional Public Prosecutor, the evidence given by the postmortem doctor, who has seen actually the injury as well as the weapon alone, should prevail in preference. Then applying the principle laid down by the Apex Court, in Thaman Kumar's case, this injury should go under the second category and therefore, the injury does not correspond with the dimension and size of the weapon could not create, in our opinion, any doubt about the deployment of this weapon, to cause the stab injury, subject to confirmation by the ocular evidence. Thus fixing M.O.3 could cause the stab injury like one, noticed by P.W.6, over the body of Duraisamy, we have to see the oral testimony of the eye witnesses.

30. The learned counsel for the appellants would contend that the evidence given by P.Ws.1, 2, 7 & 8 could not be accepted as such, since their evidence is against probability, consisting innumerable contradictions and omissions. The incident had taken place on 22.4.1994. P.W.1 and other eye witnesses were examined in the month of October 19 95 i.e. after 1 1/2 years. Therefore, when the eyewitnesses are cross, examined at length after one year or so, then definitely there bound to be contradictions and omissions. An over enthused witness, apprehending that his answer may cause any abrasion, may go out of the way, to say something. That does not mean, his evidence should be totally ignored, forgetting the duty of the Court to separate the chaff from the grain. The Apex Court has also ruled in Munshi Prasad v. State of Bihar [(2002) 1 SCC 351] that the purpose of pointing out the contradiction and omission is, as contemplated under Section 155 of the Indian Evidence Act, to impeach the credit of witness, that does not mean the inconsistent statement which is liable to be contradicted, would automatically affect the credit of the witness. Therefore, on the basis of the contradiction or the omission, as the case may be we are not inclined to eschew the oral evidence of P.Ws.1, 2, 7 and 8 since we are unable to entertain any doubt about their presence, at the scene of crime. It is also the case of the defence, that some of the witnesses have assaulted A1 & A2, and they are the aggressors and in this way, it could be said, their presence is also admitted. Hence, instead of ignoring the evidence, on the basis of interestedness and contradictions or omissions, we have to find out the trustworthiness of the evidence.

31. The son of the deceased Duraisamy, P.W.1 has spoken not only about the previous enmity, but also the incident which took place on 22.4.1994, fairly, without suppressing the questioning of P.W.7. When his brother was assaulted in the absence of the family members in the village, he shouted and at that time, the first accused came there with Aruval and the second accused came with the iron pipe. The shouting of P.W.7 would not lead to the inference, that they are the aggressors, since it is brought to surface that the accused reached the scene of crime, with deadly weapons. It is the further case of P.W.1, that the first accused cut his brother Parimalarangan with Aruval, whereas the second accused Arumugam stabbed his father, with iron pipe. This evidence indicting the second accused is fully supported and

corroborated by the oral evidence of P.Ws.2, 7 and 8. P.W.2, though she is the wife of the deceased, we find no reason to discard her testimony, which is inspiring. She would state, that the second accused stabbed her husband over the chest, causing blood to ooze out, through that injury also. Except a formal denial and casual as well as usual suggestion, nothing is materially elicited, to discard the above said evidence given by all the witnesses, which implicates the second accused with the crime viz., his role in stabbing the deceased over the chest, which injury alone took away the life of Duraisamy on the fateful day. Since the evidence available on record is cogent, convincing and inspiring, the opinion of the doctor D.W.1 as aforementioned, may not loom large, to doubt about the deployment of M.O.3, by the second accused, to stab the deceased. Thus accepting the above said oral evidence and satisfying ourselves, as did by the learned trial Judge, we would confirm the said finding of the trial Court, that only by the act of the second accused, Duraisamy died and the said act should come within the meaning of "murder", since according to the witnesses, the second accused while stabbing did the said act, declaring @xHpe;Jnghlh@, thereby showing his intention to commit murder. There is no possibility of bringing the act of the accused, under any other lesser offence, than the murder. In the light of the above discussion, accepting the evidence of the prosecution, we would conclude, that the offence against the second accused under Section 302 I.P.C. is proved, beyond all reasonable doubt.

32. The contention of the learned counsel for the accused appellants that P.W.1, 7, 8 and the deceased are the aggressors, is not acceptable to us, in view of the number of persons injured on the side of the prosecution, that too considering the weapons used by the accused in this case. If the prosecution witnesses are to be considered as aggressors, at least they should have used some deadly weapons, to inflict injuries, to the accused and it is not the established case. Therefore, dropping of the case by the police on the complaint given on behalf of the accused is immaterial in this case, since the injury is explained otherwise also, for the reasons assigned by us supra.

33. We find no delay in moving the wheel of investigation also in this case, as spoken by P.W.1, which is supported by P.W.2. P.W.1 would state that after the incident he rushed to the police station at about 10.15 p.m. and preferred a complaint. The original complaint is not available in this case. It seems the original complaint and the printed first information report have been lost in the court, for which action is being taken. P.W.3, the head clerk of the concerned court has deposed, that the printed first information report in Cr.No.40 3/93, reached the court on 22.4.1994 at about 11.45 p.m. This evidence is not questioned. Because of the fact, the original complaint was lost, it was reconstructed with the help of the copy available with the police and this fact is spoken by P.W.3, not challenged. Therefore, non availability of the original complaint also failed to create any doubt in this case. The complaint was lodged in time or without delay and the investigation also started forthwith, as spoken by P.Ws.13 and 15. P.W.13 would state that he received the complaint from P.W.1 on 22.4.1994 at about 10.30 p.m. and registered a case in Cr.NO.1 47, 148, 323, 324 and 302 I.P.C. He further says, at about 11.30 p. m., he went to the scene of crime and

helped the inspector, for investigation. He has also deposed, about the fact of registering the case, on examining the first accused in Cr.No.404/94, for offences under sections 147, 148, 323 and 324 I.P.C. The Inspector, P.W.15 reached the spot at about 11.30 p.m., prepared observation mahazar as well as sketch and examined the witnesses, and also recorded their statements. He has also given evidence, about the arrest of the A5, A4, A3 as well as A2 and recovery of M.Os.2 & 3, in pursuance of the confession given by A2 under Ex.P.13 and Ex.P.14. The weapon so recovered, was identified by the eyewitnesses. We find no lapses in the investigation also, to doubt about the prosecution case and in this view also, the finding of the lower Court, as far as A2 is concerned, is to be confirmed.

34. For the foregoing reasons, we are of the considered opinion, that offences under Sections 148, 147, 302, 302 r/w 149 I.P.C. are not made out against A1, A3 to A6, A3 to A5 and A1 and A6 respectively, and they are acquitted from the above charges. We confirm the conviction under Section 324 I.P.C. against A1 and A6 and modify the sentence of imprisonment to the period already undergone by them; also confirming the conviction and sentence, under Section 302 I.P.C. against A2 .

In the result, the appeal is allowed, modifying the judgment of the trial Court, in S.C.No.109/1995 dated 21.11.1995, on the file of Sessions Judge, Vallalar District, Cuddalore, to the above said extent. The bail bonds executed by A1, A3 to A5 shall stand discharged. The second accused is directed to surrender before the trial Court, within fifteen days from today and on his failure to surrender, the trial Court is directed to take steps, to secure the accused, to undergo the remaining period of sentence.

To
1. The Sessions Judge, Cuddalore.
2. The Inspector of Police,
Nellikuppam Police Station.
3. The Public Prosecutor,
High Court, Madras.
4. The Director General of Police,
Mylapore, Madras